STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

Illinois Commerce Commission	:	
	:	
-vs-	:	
	:	
Illinois Bell Telephone Company	:	
	:	**06-0027**
Investigation of specified tariffs declaring certain services to be competitive telecommunications services.	:	

CCSAO'S DRAFT ORDER LANGUAGE:

ADMINSTRATIVE LAW JUDGE'S PROPOSED ORDER

June 30, 2006

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DRAFT PROPOSED LANGUAGE:

ADMINSTRATIVE LAW JUDGE'S PROPOSED ORDER[1]

By the Commission:

I. PROCEDURAL BACKGROUND

Illinois Bell Telephone Company ("AT&T Illinois") filed tariffs on November 10, 2005 classifying various residential services as competitive beginning November 11, 2005. The Illinois Commerce Commission's ("ICC" or "Commission") Order noted:

> "…The tariffs classify as competitive for all residential customers in MSA 1 (a/k/a the Chicago, Illinois LATA) network access lines, ISDN Direct lines, local usage, selected optional features, directory listing services, billing services and selected packages. The Company also classified for all Residential customers in MSA 1 certain packages containing combinations of specified services and combinations of services previously classified as non-competitive and services previously classified as competitive…"
>
> ICC Order at 1, 06-0027, e-docket January 11, 2006.

The Commission opened an investigation on January 11, 2006 and noted: "…that, pursuant to Section 13-502 of the Public Utilities Act, an investigation is initiated into whether the classification as competitive of the services provided by Illinois Bell Telephone Company pursuant to the tariff sheets listed in Appendix A is proper…" ICC Order at 5, 06-0027, e-docket January 11, 2006.

[1] Partial proposed order covering CCSAO positions.

Petitions to intervene were filed or appearances were entered on behalf of AARP; the People of the State of Illinois by Lisa Madigan, Attorney General of the State of Illinois ("Attorney General" or "AG"); the Citizens Utility Board ("CUB"); the City of Chicago; the Cook County State's Attorney's Office ("CCSAO"); Data Net Systems, L.L.C. ("Data Net Systems"); Gallatin River Communications L.L.C. ("Gallatin"); Illinois Bell Telephone Company ("AT&T Illinois"); and TruComm Corporation ("TruComm"). The Staff of the Illinois Commerce Commission was represented by their counsel.

Evidentiary hearings were initially held on April 3-6, 2006 at the offices of the Commission in Chicago. On May 10, 2006 AT&T Illinois and CUB submitted a stipulation and joint proposal. An evidentiary hearing was held on the joint proposal on June 5-6, 2006 at the offices of the Commission in Chicago.

The following witnesses testified on behalf of AT&T Illinois:

The following witnesses testified on behalf of Staff:

The following witnesses testified on behalf of the Attorney General:

The following witnesses testified on behalf of Data Net Systems:

The following witness testified at the June evidentiary hearing on behalf of the Attorney General, AARP, the City of Chicago and the Cook County State's Attorney's Office: Dr. Lee Selwyn.

The CCSAO filed an initial brief. The CCSAO stood on its initial brief and did not file a reply brief.

II. PUBLIC UTILITIES ACT REQUIREMENTS

The Public Utilities Act provides for when tariffed telecommunications services provided by telecommunications carriers are to be classified as competitive or noncompetitive. 220 ILCS 5/13-502(a). With respect to when a service is considered competitive the Act provides:

> A service shall be classified as competitive only if, and only to the extent that, for some identifiable class or group of customers in an exchange, group of exchanges, or some other clearly defined geographical area, such service, or its functional equivalent, or a substitute service, is reasonably available from more than one provider, whether or not any such provider is a telecommunications carrier subject to regulation under this Act. 220 ILCS 5/13-502(b).

The Commission has the authority to investigate the propriety of any classification of a telecommunications service. The burden of proof is on AT&T Illinois in this case. As the Act states: "…In any hearing or investigation, the burden of proof as to the proper classification of any service shall rest upon the telecommunications

carrier providing the service…" 220 ILCS 5/13-502(b). With respect to what the Commission shall consider, the Public Utilities Act provides that:

> (c) In determining whether a service should be reclassified as competitive, the Commission shall, at a minimum, consider the following factors:
>
> (1) the number, size, and geographic distribution of other providers of the service;
>
> (2) the availability of functionally equivalent services in the relevant geographic area and the ability of telecommunications carriers or other persons to make the same, equivalent, or substitutable service readily available in the relevant market at comparable rates, terms, and conditions;
>
> (3) the existence of economic, technological, or any other barriers to entry into, or exit from, the relevant market;
>
> (4) the extent to which other telecommunications companies must rely upon the service of another telecommunications carrier to provide telecommunications service; and
>
> (5) any other factors that may affect competition and the public interest that the Commission deems appropriate.
>
> 220 ILCS 5/13-502(c).

The Commission, after considering the factors and intent of the Public Utilities Act and the record evidence before it, reverses the various competitive reclassifications and concludes that the tariffs before the Commission should be reclassified as noncompetitive. While the Commission is sympathetic to the issues facing AT&T in the marketplace, the Commission is bound by the requirements of the Public Utilities Act. AT&T Illinois has not met its burden of proof in this case. The Commission looks forward to the day when the residential market is competitive, however that day is not today.

III. NATURE OF THE EVIDENCE

CCSAO Position

The CCSAO raised an objection at the hearing focusing on the admission of Mr. Wardin's direct and rebuttal testimony. In looking to the testimony provided by AT&T through its witness Wardin, the Commission needs to determine the witness's basis of knowledge on whether there is improper reliance on hearsay. While the Administrative Law Judge overruled the CCSAO's objection focusing on the admission of Wardin's direct and rebuttal testimony, the Commission should decide this issue independently. See: Transcript, April 4, 2006 at 305-307; April 5, 2006 at 598-599. The CCSAO contends the Commission needs to determine if the type of material in Mr. Wardin's testimony is the type of material that an expert in the field would reasonably rely on. In *Wilson v. Clark*, the Illinois Supreme Court adopted Federal rules of evidence 703 and 705. 84 Ill. 2d 186, 194, 417 N.E.2d 1322, 1981 Ill. LEXIS 244, 49 Ill. Dec. 308 (1981). The rules have been interpreted to allow opinions based on facts not in evidence. However, care needs to be taken to ensure that facts or data that the expert is relying on is: "…If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence" *Fed. R. Evid. 703*.…" The CCSAO contends that the wholesale importing into this case by Mr. Wardin of the data and testimony of the competitors in the market is improper.

The CCSAO maintains that while the Commission's rules of practice provide some flexibility with respect to the admission of evidence, what AT&T has done in Mr. Wardin's testimony has gone too far. The Commission's Rules of Practice provide the following on evidence:

> *"…In contested cases, and licensing proceedings, the rules of evidence and privilege applied in civil cases in the circuit courts of the State of Illinois shall be followed. However, evidence not admissible under such rules may be admitted if it is of a type commonly relied on by reasonable prudent persons in the conduct of their affairs.* [5 ILCS 100/10-40]…"

83 Ill.Admin. Code Section 200.610.

The CCSAO contends that reasonably prudent persons in the conduct of their affairs would not rely on some of the types of evidence included in Mr. Wardin's testimony with respect to AT&T's various competitors. To the extent that AT&T Illinois was trying to show services available from other providers to meet its burden of proof, it should have produced testimony from those providers or other admissible evidence to meet the various requirements of the Public Utilities Act for a service to be properly classified as competitive. If the Commission believes that the ALJ properly admitted Mr. Wardin's testimony, then in light of the type of evidence AT&T Illinois relies on the

Commission should consider that in deciding what weight to give the various data included.

Commission's Analysis and Conclusions

The Commission agrees with the concerns expressed by the CCSAO regarding the nature of the evidence that AT&T Illinois relies upon in Mr. Wardin's direct and rebuttal testimony. The Commission agrees to the extent AT&T Illinois was trying to show services available from other providers to meet its burden of proof AT&T Illinois should have offered testimony from those providers or other admissible evidence to meet the various requirements of the Public Utilities Act for a service to be properly classified as competitive. Ultimately, since we believe that AT&T Illinois has not met its burden of proof, even with the evidence that CCSAO objects to, we need not decide that issue today. Ultimately, parties are reminded that the rules of evidence do apply and should not rely on evidence that does not comply with Illinois law and Commission rules.

IV. LEGISLATIVE PACKAGES SECTION 13-518

CCSAO Position

The CCSAO argued that the optional service packages provided pursuant to Section 13-518 are noncompetitive as a matter of law. The Illinois General Assembly in Section 13-518 provided for three optional services packages. This Section's source was Public Act 92-22 and has been effective since June 30, 2001. The three packages in Section 13-518 are:

> (1) A budget package, which shall consist of residential access service and unlimited local calls.
>
> (2) A flat rate package, which shall consist of residential access service, unlimited local calls, and the customer's choice of 2 vertical services as defined in this Section.
>
> (3) An enhanced flat rate package, which shall consist of residential access service for 2 lines, unlimited local calls, the customer's choice of 2 vertical services as defined in this Section, and unlimited local toll service.
>
> 220 ILCS 5/13-518(a)(1), (2) and (3).

The CCSAO contended that in deciding whether these packages are competitive or noncompetitive, the Commission needs to look no further then the Public Utilities Act. The legislature provided in the Act that the packages in Section 13-518 are noncompetitive and clearly stated that: "…The service packages described in this Section shall be defined as noncompetitive services…" 220 ILCS 5/13-518(d).

The CCSAO argued that the Illinois Commerce Commission lacks the authority to allow the packages to remain classified as competitive where Illinois law provides that they are noncompetitive. Ultimately, the Commission's authority is limited to that provided by Illinois law. The Illinois Commerce Commission was created pursuant to what is now Section 2-101 of the Public Utilities Act. 220 ILCS 5/2-101. The duties and general powers of the Commission are described in Article 4 and elsewhere throughout the Public Utilities Act. 220 ILCS 5/4 et. al. As the Illinois Supreme Court has noted "…The sole power of the Commission stems from the statute, and it has the power and jurisdiction only to determine facts and make orders concerning the matters specified in the statute. (citation omitted)…" *Union Electric Company v. The Illinois Commerce Commission et al., Illinois Bell Telephone Company v. The Illinois Commerce Commission*, 77 Ill.2d 364, 383, 396 N.E.2d 510, 519 (1979).

The CCSAO noted that the language in Section 13-518 is clear and to the point. The Commission should be consistent with that language and find that the packages are noncompetitive as a matter of law. With respect to statutory construction the Illinois Supreme Court stated in the case of *In re Estate of Herman J. Dierkes (Estate of Herman J. Dierkes, Appellee; The Department of Transportation, Appellant)*. 191 Ill. 2d 326, 331, 730 N.E.2d 1101 (2000):

> The cardinal rule of interpreting statutes, to which all other canons and rules are subordinate, is to ascertain and give effect to the intent of the legislature. In determining legislative intent, a court should first consider the statutory language. *King v. Industrial Comm'n, 189 Ill. 2d 167, 171, 244 Ill. Dec. 8, 724 N.E.2d 896 (2000); McNamee v. Federated Equipment & Supply Co., 181 Ill. 2d 415, 423, 229 Ill. Dec. 946, 692 N.E.2d 1157 (1998).* Specifically in construing the Act, all portions thereof must be read as a whole, and in such a manner as to give them the practical and liberal interpretation intended by the legislature. *McNamee, 181 Ill. 2d at 428; K. & R. Delivery, Inc. v. Industrial Comm'n, 11 Ill. 2d 441, 445, 143 N.E.2d 56 (1957).*

Further in the Illinois Supreme Court in *Western National Bank of Cicero, Trustee, et al., v. The Village of Kildeer et al.,* 19 Ill. 2d 342, 350, 167 N.E.2d 169 (1960) stated:

> It is a primary rule in the interpretation and construction of statutes that the intention of the legislature should be ascertained and given effect. (*Petterson v. City of Naperville, 9 Ill.2d 233; Belfield v. Coop, 8 Ill.2d 293.)* This is to be done primarily from a consideration of the legislative language itself, which affords the best means of its exposition, and if the legislative intent can be ascertained therefrom it must prevail and will be given effect without resorting to other aids for construction. (*People ex rel. Mayfield v. City of Springfield, 16 Ill.2d 609; Louis A. Weiss Memorial Hospital v. Kroncke, 12 Ill.2d 98.)* There is no rule of construction which authorizes a court to declare

> that the legislature did not mean what the plain language of the statute imports.

The CCSAO contends that in looking to the language of the statute, the Commission should conclude the plain meaning of the statute leads one to conclude that the 13-518 packages are noncompetitive as a matter of law.

A principle of statutory construction the Commission may consider was discussed by the Illinois Supreme Court in *Metzger v. DaRosa,* 209 Ill.2d 30, 44, 805 N.E.2d 1165 (2004) where the court noted that:

> The familiar maxim *expressio unius est exclusio alterius* is an aid of statutory interpretation meaning "the expression of one thing is the exclusion of another." Black's Law Dictionary 581 (6th ed. 1990). "Where a statute lists the things to which it refers, there is an inference that all omissions should be understood as exclusions ***." *Burke v. 12 Rothschild's Liquor Mart, Inc.*, 148 Ill. 2d 429, 442, 593 N.E.2d 522, 170 Ill. Dec. 633 (1992). This rule of statutory construction is based on logic and common sense. It expresses the learning of common experience that when people say one thing they do not mean something else. The maxim is closely related to the plain language rule in that it emphasizes the statutory language as it is written. 2A N. Singer, Sutherland on Statutory Construction § 47.24, at 228, § 47.25 at 234 (5th ed. 1992).

The CCSAO argued that where the statute said noncompetitive, the Commission should not conclude that they somehow meant something else.

In the end the CCSAO noted with respect to certain packages, one of the only factual questions for the Commission to decide is which of the tariffs are being provided pursuant to Section 13-518. Which packages constitute the 13-518 packages is not something that has been contested in this case. ICC Staff witness Dr. James Zolnierek testified with respect to which packages are provided pursuant to Section 13-518 and stated:

> "…A. IBT currently provides: (1) a Residence Saver Pack Unlimited, provided since September, 4, 2001, pursuant to Section 13-518(a)(1) of the Act; (2) a Flat Rate Package, provided since August 12, 2002, pursuant to Section 13-518(a)(2) of the Act; and (3) an Enhanced Flat Rate Package, provided since August 12, 2002, pursuant to Section 13-518(a)(3) of the Act.[17] Each of these packages is described below…" (citation omitted)[2]
>
> ICC Staff Ex. 2.0 at 12-13 (Zolnierek).

[2] Zolnierek cited to "IBT Response to Staff Data Request JZ 3.01."; footnote 17, ICC Staff Ex. 2.0 at 13 (Zolnierek).

The CCSAO contends that in light of the legislature's creation of these three packages and the Act's classification of them as noncompetitive, the Commission is required to reclassify the three packages as noncompetitive. To the extent that AT&T is unhappy with the law, they need to seek change in the legislature. Until then consumers are entitled to those packages being offered as noncompetitive services.

The CCSAO pointed out that the issue with respect to the legislative packages was also the subject to the People of The State of Illinois's Motion for Summary Judgment and Reclassification of Section 13-518 Packages. ICC 06-0027, e-docket March 23, 2006[3]. The Cook County State's Attorney's Office in its brief adopted those arguments and joins in the Illinois Attorney General's Office's request and urged the Commission to grant the Attorney General's motion immediately.

Commission's Analysis and Conclusions

In deciding this issue with respect to the optional service packages the Commission looks to the language of Section 13-518 of the Public Utilities Act. Section 13-518 provides for three optional service packages. There is no dispute as to which packages this applies to: (1) a Residence Saver Pack Unlimited; (2) a Flat Rate Package; and (3) an Enhanced Flat Rate Package. With respect to the noncompetitive classification of these packages, Section 13-518 provides: "…The service packages described in this Section shall be defined as noncompetitive services…" 220 ILCS 5/13-518(d). The Public Utilities Act defines the Commission's authority in this area and leaves the Commission with no discretion. The Act provided that these packages are noncompetitive. Therefore we find that they must be reclassified as noncompetitive. The Commission believes it has no discretion in this area. To the extent that AT&T Illinois wants to reclassify any of the three optional service packages, this needs to be done by the legislature.

[3] There was also filed the People of the State of Illinois's Reply Regarding Their Motion for Summary Judgment and Reclassification of Section 13-518 Packages, ICC 06-0027, e-docket March 31, 2006. The CCSAO also supports the arguments made in the Illinois Attorney General's Office's reply.

V. LOCAL MEASURED SERVICE – RESIDENTIAL ACCESS LINE AND USAGE (BAND A AND B)

CCSAO Position

CCSAO contends the record in this case should lead the Commission to conclude that there is no meaningful competition for consumers seeking a residential access line by itself and paying for usage ala carte. The CCSAO's position was that the access line classification should be reclassified as noncompetitive. The CCSAO pointed out that initially in the case, the only party advocating in testimony that the residential access line be declared competitive was AT&T Illinois. CUB later joined them in advocating this in their joint proposal. However, the CUB witness at the hearing on the joint proposal stood by their testimony. The CCSAO noted that the Commission needs to look at the record evidence in this case which includes CUB's earlier testimony on this issue. In its brief, the CCSAO pointed to the testimony of CUB witness McKibbin, Staff Witness Dr. Staranczak and AG witness Dr. Selwyn in support of its position.

The CCSAO contends that the record in this case shows clear issues with respect to competition for the local access lines and usage. Other than AT&T Illinois, there was initially no other party that contends that a stand-alone basic access line should be competitive based on the actual evidence in their testimony. While CUB supports the competitive declaration in their testimony in support of the Joint Proposal, the CUB witness at the hearing stood by their earlier testimony in the case. However, these customers will be subjected to the possibility of rate increases under the joint proposal. The CCSAO argued that the Commission should reject AT&T's contentions in this area and reclassify the local access line and local measured usage. Clearly, the access line should remain noncompetitive and subject to alternative regulation.

Commission's Analysis and Conclusions

The Commission has reviewed the record with respect to the residential access line and local measured usage. The Commission is of the opinion that these classifications should be reversed and the services should be classified as noncompetitive. At the outset we note that the burden of proof is on AT&T Illinois as they are the telecommunications carrier providing service. The Public Utilities Act states: "…In any hearing or investigation, the burden of proof as to the proper classification of any service shall rest upon the telecommunications carrier providing the service…" 220 ILCS 5/13-502(b). The Commission finds that AT&T Illinois has not met its burden of proof with respect to these tariffs.

The Commission agrees with Staff witness Dr. Genio Staranczak that for the purposes of reclassification the local measured service market is distinct from the bundled service market. See: ICC Staff Ex. 1.0 (Revised) (Staranczak) at 5, lines 100-

129. See also AG Ex. 1.0 at 23. The Commission notes that Dr. Staranczak testified that there are not many competitors for local measured service. See: ICC Staff Ex. 1.0 at 8, lines 159-186. Further, Dr. Staranczak summarized his conclusions in the measured service market and stated:

> "…AT&T Illinois' own filing indicates that there are, at best, one or two less than active competitors in the measured service market, and these competitors provide service to just a few customers. Although there are a number of competitors offering bundled services, these packages along with the packages marketed by AT&T Illinois are not viable economic substitutes for measured service. This is because the packages, cost at least 50% more per month than a low volume user who makes a hundred local calls or less a month would pay for access and local usage (and 15% or more per month than a measured service user who also subscribes to a vertical feature would pay a month) VoIP telephony is only available to the less than 50% of households who subscribe to broadband, and can be more expensive than measured usage rates offered by AT&T Illinois (assuming the average local call is three minutes in length). Wireless service providers do offer limited forms of measured service, but at rates 1,500% higher than those charged by AT&T Illinois. Finally, resale is not facilities based competition and consequently will not act to constrain ILEC measured service prices…" ICC Ex. 1.0 (Staranczak) at 14-15, lines 282-300.

The Commission is persuaded by the viewpoint of Dr. Staranczak with respect to lack of competition in regards to measured service. Dr. Staranczak's testimony showed how measured service failed to satisfy the Public Utilities Act. As noted by Dr. Staranczak:

> My analysis clearly demonstrates that measured service subscribers are an identifiable and distinct class of users for PUA Section 13-502(b) purposes. Furthermore, given the evidence to date, my examination establishes that measured service fails to satisfy any of the competitive criteria listed under Section 13-503(c) [sic] of the PUA. In particular: (1) as I have shown above, there are effectively no landline measured service competitors in MSA-1; (2) bundled services and wireless services are not readily substitutable for measured service because they are not offered at comparable rates; (3) current UNE and measured service pricing acts as an effective barrier of entry into the measured service market; (4) the only price constraining competition that is likely emerge is UNE based (i.e. it relies upon the service of an existing ILEC;) and (5) the public interest is not served by an immediate reclassification of measured service because an immediate reclassification will give AT&T the ability to simply raise rather than rebalance measured service rates. ICC Staff Ex. 1.0 (Staranczak) 16, lines 325-338.

The Commission also notes the concern of AG witness Dr. Selwyn with respect to whether AT&T Illinois faces any competitive pricing constraints for its stand alone basic access line:

> No. Given that CLECs are only competing for customers that purchase services from a different product market, i.e. bundles of services priced anywhere from $20 and up, IBT faces little if any competitive price pressure for its *stand-alone basic local access line* service that customers are purchasing for $7.05 to $13.50.
>
> AG Ex. 1.0 (Selwyn) at 31, lines 6-9.

Further, CUB before agreeing to the joint proposal, also raised concerns with respect to these tariffs. Ultimately, we conclude that these tariffs should be reclassified as noncompetitive. With respect to Staff's arguments regarding rate rebalancing, we decline to take up Staff's invitation at this time. The purpose of this docket is reviewing the classifications of the various services and not the prices.

VI. PACKAGES

CCSAO Position

The CCSAO contended that a more challenging area in this case involves packages offered in MSA1. The CCSAO notes that there are competitors offering packages of services to consumers in MSA1. AT&T Illinois presented testimony that packages were properly classified as competitive. Dr. James Zolnierek, who testified on behalf of the ICC Staff, was of the opinion that AT&T had properly reclassified residential local service packages in MSA1 as competitive. ICC Staff Ex. 2.0 at 90-96, ICC Staff Ex. 9.0 at 4.

However, the CCSAO pointed out that Data Net Systems witness Joseph Gillan concluded that: "The Commission should deny AT&T Illinois' request for a competitive classification of its residential services in the Chicago LATA." Data Net Systems Ex. 1.0 (Gillan) at 39, lines 24-27.

Further, the CCSAO noted that Dr. Selwyn indicated in his testimony that bundled services and service packages were not sufficiently competitive to warrant reclassification at this time. AG Ex. 1.0 (Selwyn) at 52, lines 1-15.

While the issues with respect to packages are a closer call, the CCSAO contends that AT&T Illinois has not met its burden of proof showing that the market is competitive within the meaning of the Public Utilities Act. Further, the Commission should not consider VoIP or Wireless services as the functional equivalent at this time. With respect to the Act, we further urge the Commission to use its discretion and find that, given the lack of facilities based providers, that AT&T Illinois has not met its burden of proof.

Commission's Analysis and Conclusions

The Commission recognizes the changing landscape with respect to telecommunications and shares the concerns raised by AT&T Illinois. However, the burden of proof is on AT&T Illinois and we conclude they have not met their burden of showing the packages are competitive within the meaning of the Public Utilities Act.

VII. CALLER ID AND CALL WAITING

The Public Utilities Act specifically addresses caller identification and call waiting. In Section 13-502.5 in general dealing with services alleged to be improperly classified, the section provided that:

"…All retail vertical services, as defined herein, that are provided by a telecommunications carrier subject, as of May 1, 2001, to alternative regulation under an alternative regulation plan pursuant to Section 13-506.1 of this Act shall be classified

as competitive as of June 1, 2003 without further Commission review. Retail vertical services shall include, for purposes of this Section, services available on a subscriber's telephone line that the subscriber pays for on a periodic or per use basis, but shall not include caller identification and call waiting…"

220 ILCS 5/13-502.5(c).

CCSAO Position

The CCSAO contended that caller ID and call waiting should be reclassified as noncompetitive based on Section 13-502.5.[4] An issue before the Commission is whether caller ID and call waiting can be declared competitive in light of the language of Section 13-502.5(c). The CCSAO pointed out that the legislature signaled out caller ID and call waiting for different treatment when it made the various other vertical services competitive. Section 13-502.5 also provides that "…All other services shall be classified pursuant to Section 13-502 of this Act…" 220 ILCS 5/13-505.5(f).

The CCSAO candidly noted that it is a little unclear where this leaves Caller ID and call waiting under the Public Utilities Act. Yet, the legislature chose at that time to leave Caller ID and call waiting as noncompetitive services. The CCSAO contended that Section 13-502.5(f) appears to remove caller ID and call waiting from the scope of Section 13-502.

The CCSAO maintained that it is unnecessary to reach the legal issue if the Commission adopts the CCSAO view that all the other tariffs in the case should be reclassified as noncompetitive. CCSAO advocated that the Commission should adopt the opinion of its Staff member Dr. Genio Staranczak. Dr. Staranczak was of the opinion that caller ID and call waiting is not competitive for measured service users. ICC Staff Ex. 1.0 (Revised) (Staranczak) at 17, lines 350-368.

Ultimately, the CCSAO contended that if one concludes that the law allows reclassification with respect to caller ID and call waiting in packages, their classification should go with the line. The CCSAO contends that the various reclassifications for the access lines and packages were contrary to the Public Utilities Act and should be reclassified as noncompetitive, then similarly caller ID and call waiting should follow those classifications and also be declared noncompetitive.

Commission's Analysis and Conclusions

The Commission finds that caller ID and call waiting should be reclassified as noncompetitive. The Commission finds that the public utilities act specifically discusses caller ID and call waiting in Section 13-502.5. The legislature signaled out caller ID and call waiting for different treatment when it made the various other vertical services competitive. Further, section 13-502.5 also provides that "…All other services shall be

[4] The CCSAO Initial Brief mentioned voice mail on page 19 of its initial brief. That should have been a reference to call waiting.

classified pursuant to Section 13-502 of this Act…" 220 ILCS 5/13-505.5(f). The Commission is of the opinion that this language removes caller ID and call waiting from the purview of Section 13-502. Therefore these service shall be reclassified and remain noncompetitive until such time that the law is changed.

VIII. PUBLIC INTEREST

The Commission is required to consider "any other factors that may affect competition and the public interest that the Commission deems appropriate…" 220 ILCS 5/13-502(c)(5).

CCSAO Position

The CCSAO contended that the Commission should consider where the reclassification would leave consumers and prices. The CCSAO pointed to the testimony of Dr. Selwyn who noted with respect to the public interest by Dr. Selwyn, "…The statutory requirements for reclassification of residential services in MSA-1 have not been satisfied, and reclassification at this time is clearly not in the public interest…" AG Ex. 1.0 at 10, lines 20-21.

The CCSAO also contended that the Commission needs to consider the uncertainty created by the pending challenge to Illinois UNE provisions[5]. The CCSAO also noted that in looking at the public interest, the Commission should consider its alternative regulation plan and how this will be affected. One of the consequences that result from a competitive declaration is that any services declared competitive will be no longer subject to the Commission's Alternative Regulation plan for AT&T Illinois. As noted by Dr. Selwyn "Because the annual rate of inflation has generally been less than the so-called "X Factor" or productivity offset factor adopted in that proceeding, services subject to the price cap have been experiencing a succession of annual rate reductions for more than a decade." AG Ex. 1.0 (Selwyn) at 11, Lines 21-23. Therefore, any of these services that remain classified as competitive will not be subject to the Alternative Regulation formula which has lead to rate reductions. In considering the public interest, the Commission should ensure that ratepayers are protected by the Alternative Regulation plan until such time as there is competition within the meaning of the Public Utilities Act.

The CCSAO also pointed to the testimony of CUB witness McKibbin who noted "…Further, the public interest demands that AT&T's Residential Local Usage and the Residential Network Access Line remain regulated until customers, who need basic telephone service to contact emergency services, jobs, and schools, enjoy robust competition…" CUB Ex. 1.0 (McKibbin) at 3.

[5] Illinois Bell Telephone Company v. Hurley et al. 2005 U.S. Dist. LEXIS 6022, (N.D. IL, March 29, 2005).

Commission's Analysis and Conclusions

The Commission is required to consider "any other factors that may affect competition and the public interest that the Commission deems appropriate…" 220 ILCS 5/13-502(c)(5). The Commission finds that the reclassifications by AT&T Illinois are not in the public interest. The Commission is concerned with the challenges facing competitors in the UNE market and the uncertainty created by the Federal Court challenge. Further, the Commission is of the opinion that AT&T Illinois has not met its burden of proof in this case. Until the requirements of the Public Utilities Act are met with respect to reclassification it cannot be in the public interest for services that lack the required level of competition to be declared competitive. AT&T Illinois has not proven that the Act has been met.

IX. AT&T ILLINOIS & CUB JOINT PROPOSAL

CCSAO Position

The CCSAO contends that the Commission should reject the AT&T Illinois and CUB joint proposal. The CCSAO had no objection to the rate decreases in the joint proposal. Further, to the extent that AT&T Illinois wants to voluntarily fund a consumer education fund – the CCSAO had no objection. The CCSAO objected to how the joint proposal treats the competitive reclassifications. The CCSAO contends that the reclassifications should be reversed and therefore the joint proposal should be rejected.

The CCSAO argued that since there is not unanimous support of all the parties in the case for the joint proposal, then the Commission needs to comply and proceed based on record evidence consistent with *Business and Professional People for the Public Interest et al*. See *Business and Professional People for the Public Interest et al., v. The Illinois Commerce Commission et al.,* 136 Ill. 2d 192, 216-217, 555 N.E.2d 693 (1989) where the Illinois Supreme Court has stated that unanimous support is required for settlements. If not, then the Commission must make an independent finding supported by the record as a whole that the proposal is supported by substantial evidence.

Turning to the record at a whole, the CCSAO contends that the Commission should reject the joint proposal. Only AT&T Illinois and CUB were parties to the joint proposal and they both filed testimony in support of the proposal. AT&T Illinois Ex 1.4, 1.5 (Wardin), CUB Ex 5.0, 6.0 (McKibbin). While CUB provided testimony supporting the joint proposal, their original testimony in the case still remains in the record.

Dr. Selwyn testified in opposition to the joint proposal on behalf of the Illinois Attorney General's Office, the CCSAO, the City of Chicago and AARP. AG Ex 1.2 (Selwyn). The CCSAO in its brief pointed to the testimony of Dr. Selwyn who testified that the settlement as presented is not in the public interest. AG Exhibit 1.2 (Selwyn) at 2, lines 13-23. Dr. Selwyn also testified:

> The testimony and other evidence offered in support of the settlement compels the conclusion that meaningful *and independent* competition – i.e., competition that is not wholly or substantially dependent upon IBT wholesale services – simply does not exist at this time, and that reclassification of residential services in MSA-1 to the "competitive" category is premature and certainly not in the public interest. AG Ex. 1.2 (Selwyn) at 46, lines 6-10.

The CCSAO noted that ultimately a review of the record leads ones to the conclusion that the joint proposal should be rejected.

Commission's Analysis and Conclusions

The Commission notes at the outset that the joint proposal does not have the unanimous support of all the parties that is required for settlements. Therefore, the Commission needs to comply and proceed in reviewing the joint proposal based on record evidence consistent with *Business and Professional People for the Public Interest et al*. See *Business and Professional People for the Public Interest et al., v. The Illinois Commerce Commission et al.,* 136 Ill. 2d 192, 216-217, 555 N.E.2d 693 (1989) where the Illinois Supreme Court has stated that unanimous support is required for settlements. If not, then the Commission must make an independent finding supported by the record as a whole that the proposal is supported by substantial evidence.

The Commission at the outset commends AT&T Illinois and CUB for their efforts in attempting to craft a solution that would resolve this case. However, the Commission is bound by the record evidence in this case. Based on a review of the record, we reject the joint proposal. While the joint proposal tries to address some of the concerns of the parties, ultimately it does not measure up to what the public utilities act requires with respect to a service before it is properly declared competitive. AT&T Illinois has failed to meet its burden of proof in this case. The joint proposal does not cure that.

X. FINDINGS AND ORDERING PARAGRAPHS

The Commission, having considered the entire record herein and being fully advised in the premises, is of the opinion and finds that:

(1) Illinois Bell Telephone Company (AT&T Illinois) is an Illinois corporation engaged in the business of providing telecommunications services to the public in the State of Illinois and, as such, is a telecommunications carrier within the meaning of Section 13-202 of the Illinois Public Utilities Act;

(2) the Commission has jurisdiction over Illinois Bell Telephone Company (AT&T Illinois) and the subject matter of this proceeding;

(3) the recital of fact and law and the conclusions reached in the prefatory portion of this Order are supported by the record, and are hereby adopted as findings of fact and conclusions of law for purposes of this Order;

(4) Illinois Bell Telephone Company (AT&T Illinois) should be required to file new tariffs reclassifying all the tariffs as noncompetitive consistent with the determinations and conclusions herein;

(5) any materials submitted in this proceeding for which proprietary treatment was granted should be accorded proprietary treatment for a period of ___ years;

(6) any petition, objections, and motions in this docket that have not been specifically disposed of should be disposed of in a manner consistent with our conclusions herein.

IT IS THEREFORE ORDERED by the Illinois Commerce Commission that Illinois Bell Telephone Company (AT&T Illinois) shall, within 14 days of the entry of this Order, file tariffs reclassifying all the tariffs as noncompetitive consistent with the determinations and conclusions herein.

IT IS FURTHER ORDERED that the Illinois Bell Telephone Company's (AT&T Illinois) tariff sheets that were the subject of this proceeding presently in effect are hereby permanently canceled and annulled, effective at such time as the new tariff sheets approved herein become effective by virtue of this Order.

IT IS FURTHER ORDERED that Illinois Bell Telephone Company (AT&T Illinois) shall recalculate and re-submit its 2006 annual filings, within 30 days of the date of this order.

IT IS FURTHER ORDERED that any materials submitted in this proceeding for which proprietary treatment was requested shall be accorded proprietary treatment.

IT IS FURTHER ORDERED that any objections, motions or petitions not previously disposed of are hereby disposed of consistent with the findings of this Order.

IT IS FURTHER ORDERED that subject to the provisions of Section 10-113 of the Public Utilities Act and 83 Ill. Adm. Code 200.880, this Order is final; it is not subject to the Administrative Review Law.

DATED: _____ , 2006

BRIEFS ON EXCEPTIONS DUE: _____ , 2006

REPLIES TO EXCEPTIONS DUE: _____ , 2006